

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Mike Spalding and Marty Neilson  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** September 13, 2017  
**SUBJECT:** Proposed initiative measure 2017-2018 #51 concerning criminal justice procedures

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

## Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To add a new section to the Colorado Code of Criminal Procedure, articles 1 to 13 of title 16, C.R.S., which addresses a wide variety of criminal procedural subject matter, including but not limited to restitution, rules of criminal

- procedure, rules of evidence, bail bonding, sentencing, probation and parole, inmate labor, prosecutorial misconduct, and victims' rights;
2. To require the destruction of evidence relating to exonerated or dismissed defendants;
  3. To require the state to compensate exonerated defendants;
  4. To limit the use of bail bonding for non-violent offenders;
  5. To abolish the use of grand juries;
  6. To abolish the practice of plea bargaining;
  7. To require the state public defender, upon request, to defend any non-indigent criminal defendant at a maximum billing rate of \$70 per hour;
  8. To require the state to provide mental health testing and treatment to inmates who have a history of mental illness, sexual abuse, or alcohol or drug abuse prior to their incarceration, and to deny mental health testing and treatment to inmates who have no such history;
  9. To require the state and local governments to act during the next year to reform criminal laws and procedures;
  10. To allow prosecutors to be sued for professional misconduct; and
  11. To require the state and local governments to purchase liability insurance to pay for civil damage awards resulting from the misconduct of government employees.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Under section 1-40-105.5, Colorado Revised Statutes, the Director of Research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the Director is required to consider any fiscal impact estimate prepared by the proponents.

- a. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
  - b. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the Legislative Council staff at [BallotImpactEstimates.ga@state.co.us](mailto:BallotImpactEstimates.ga@state.co.us).
3. Subsection (1) of the proposed initiative states that the initiative "shall apply in all state and local felony and misdemeanor cases." Do you intend for the initiative to apply to petty offenses and municipal code violations as well?
4. Subsection (1) of the proposed initiative states that the initiative "shall be . . . retroactive to end injustice." Do you intend for the initiative to be retroactively effective to any specific date? Or do you intend for the initiative to be retroactively applied to all persons in custody in the state regardless of the dates of their offenses or convictions?
5. Subsection (1) of the proposed initiative states: "Violations of section 110 may void later actions." Can you explain what this means?
6. Subsection (2) of the proposed initiative states: "Victims shall receive treatment without charge to them." Do you intend for *all* crime victims to be entitled to receive "treatment" at the expense of the state? What do you mean by "treatment"?
7. Subsection (2) of the proposed initiative states: "Inmates can work 40 hours weekly at \$5 hourly." Do you intend to limit inmates to 40 hours of labor each week? By "inmates" do you mean to include persons in county jails as well as persons in the custody of the state department of corrections?
8. The fifth sentence of subsection (2) of the proposed initiative appears to set forth a prioritization for the use of wages that an inmate earns, beginning with the payment of restitution to victims. However, the fifth item in the list of priorities requires "25%" to go to "a fund for victim relief." Do you intend for this 25% to be deducted *before* the payment of restitution, child support orders, legal debts, and fines? If not, then what does the "25%" mean? (25% of what, exactly?) Also, do you intend for inmate wages to go to an existing "fund for victim relief" (e.g., the crime victim compensation fund created in section 24-4.1-117, C.R.S.), or do you intend to create a new one?

9. Subsection (2) of the proposed initiative states: "Defendants shall not pay booking, discovery, trial, custody, treatment, or any other government costs." Do you intend for this language to apply to all defendants, even those who are eventually convicted?
10. Subsection (3) of the proposed initiative states that "[d]efendants are factually innocent." Some criminal defendants are guilty of the crimes for which they are charged and convicted as such. Do you mean to say that defendants are *presumed to be* innocent?
11. Subsection (3) of the proposed initiative states: "Defendant's burden of proof shall be substantial evidence." What does this mean? In a criminal prosecution, the burden of proof lies with the prosecution, not with the defense.
12. Subsection (3) of the proposed initiative states: "All photos, DNA samples, fingerprints, and similar data of exonerated or dismissed defendants shall be destroyed." Do you intend to include any exceptions to this provision? For example, what if the prosecution intends to use the same evidence in prosecuting multiple defendants; if the charges against one of the defendants are dismissed, will the prosecution be required to destroy the evidence before prosecuting other defendants?
13. Subsection (4) of the proposed initiative states that "the state shall pay [certain monetary amounts to] all defendants fully exonerated or fully dismissed after 2017." However, subsection (1) of the proposed initiative states that the initiative is intended to be "retroactive to end injustice." Do you intend for the payment provisions of subsection (4) of the initiative to be an exception to the general retroactive application of the initiative?
14. Subsection (4) of the proposed initiative requires the state to pay to an exonerated or dismissed defendant "[c]osts and legal fees paid in the first case." What does this mean?
15. Subsection (4) of the proposed initiative requires the state to pay to an exonerated or dismissed defendant "legal fees at \$100 per hour." Do you intend for this reimbursement to be based on the number of hours that were, in fact, billed to the defendant by his or her attorney, regardless of the attorney's actual billing rate?
16. Subsection (5) of the proposed initiative states that "[c]itizens charged with non-violent crimes who reside in this state and have valid identification and no past failure to appear in court may sign a surrender letter"—presumably in lieu

of posting bail. What constitutes "valid identification"? What do you mean by the term "surrender letter"?

17. Subsection (5) of the proposed initiative states: "On appeal, such citizens may post bail equal to twice the monetary amount of loss." Do you mean to say that in the case of a defendant who appeals his or her criminal conviction, a court may not require such a person to post more than this amount? Also, what about appellate cases where there is no monetary loss at issue? Do you intend for bail to be available in such cases?
18. Subsection (5) of the proposed initiative states: "In rare cases, such citizens may instead be held six hours for booking and a court hearing on bail or bond in person or by two-way audio and video." Which cases do you intend to qualify as "rare cases" for the purposes of this provision? Who, exactly, do you mean by "such citizens"? For example, do you mean all defendants charged with nonviolent crimes or merely all such defendants who have been convicted and are now appealing those convictions?
19. Subsection (6) of the proposed initiative abolishes grand juries; however, the use of grand juries is authorized by section 23 of article II of the state constitution. Section 23 also states that "the general assembly may change, regulate or abolish the grand jury system"; however, the proposed initiative is not an act of the general assembly. Moreover, the proposed initiative is entirely statutory and makes no amendments to the state constitution. How do you intend to address the provisions of the state constitution that concern the use of grand juries?
20. Subsection (6) of the proposed initiative states: "Defendant trial testimony, and two jury statements of up to one hour each, shall not be blocked or subject to objection." Do you mean to say that a defendant is permitted to introduce any testimony in a criminal case and the prosecutor may not object? For example, may a defendant introduce testimony that otherwise would be properly excluded as hearsay under the existing Colorado Rules of Evidence? Also, what do you mean by "jury statements"?
21. Subsection (6) of the proposed initiative states: "All defendant statements in custodial questioning shall be audio-video recorded and clear." What about statements that defendants make to law enforcement officers while recording equipment is not present or not operating? Do you intend that all defendant statements shall be inadmissible in court unless they were clearly recorded on audio and video?

22. Subsection (6) of the proposed initiative states: "Only local prosecutors may file and try criminal charges." By referring to "local prosecutors," do you intend to include or exclude district attorneys? Do you intend to prohibit the state attorney general's office from prosecuting criminal cases?
23. Subsection (7) of the proposed initiative states: "Judges shall be assigned by lot." What does this mean?
24. Subsection (7) of the proposed initiative requires prosecutors to "disclose at once and in writing all suspects and all evidence." What do you mean by "at once"? To whom must a prosecutor disclose this information? Also, law enforcement agencies, not prosecutors, typically investigate "suspects"; by the time a prosecutor gets involved, a suspect has typically become a "defendant." Do you intend to require prosecutors to disclose the identity of all "suspects" for each crime that they prosecute – regardless of whether any of the "suspects" are ever actually charged with the crime?
25. Subsection (7) of the proposed initiative states: "All non-indigent defendants can hire the public defender to represent them at \$70 per hour regardless of conflicts of interest." Is it your intention to allow any criminal defendant in Colorado (that is, anyone prosecuted for any felony, misdemeanor, petty offense, or municipal code violation) to avail themselves of the services of the office of the state public defender at a maximum billing rate of \$70 per hour?
26. The first sentence of subsection (8) of the proposed initiative states: "No conviction by trial shall be punished more than by plea." What does this mean? Specifically, what does this mean in relation to subsection (7), which states that "Plea and sentence bargains shall end"?
27. The second sentence of subsection (8) of the proposed initiative states: "Sentencing shall ignore arrests without convictions." What does this mean?
28. The third sentence of subsection (8) of the proposed initiative states: "Sentencing shall not increase on re-sentencing." What does this mean?
29. Subsection (8) of the proposed initiative sets forth a sentencing scheme for "non-violent crime" whereby a convicted offender shall be sentenced to a maximum of three years of custody, plus "one year per \$50,000 loss." What do you mean by a "non-violent crime"? For example, do you mean any crime that is not included as a "crime of violence" pursuant to section 18-1.3-406 (2), C.R.S.?

30. Subsection (9) states: "It is not a crime to obey government requests." What does this mean?
31. Subsection (10) appears to require the state to require "release hearings" every six months for all "non-violent crime *defendants* [emphasis added]," at which hearings the prosecution must "prove by clear and convincing evidence" why such defendants should not be released. A criminal "defendant" is a person who is accused, but not convicted, of a crime. Few *defendants* will spend such time in custody; do you intend to refer to "prisoners," "offenders," or "inmates" rather than "defendants" here (and elsewhere) in subsection (10)?
32. Subsection (11) states: "Next year, the general assembly shall list all state crimes and vote on reducing or repealing crimes and custody, penalties, and fines." By "next year" do you mean the 2019 regular session of the general assembly?
33. Subsection (11) requires the state and local governments to vote on criminal justice reform measures next year and states: "Reductions and repeals shall apply to all past, present, and future cases of living defendants." Please explain what this means.
34. Subsection (12) states that "[p]rosecutors and others may be sued at any time for actual and exemplary damages." Who are the "others" to which this sentence refers? Do you intend to prohibit the extension of governmental immunity to prosecutors acting in their official capacity?
35. Subsection (12) states: "Governments shall obtain liability insurance to pay all such damages and costs by current or former government employees." Do you intend to require all governments—that is, the state and every county, city, city and county, and other municipalities in the state—to purchase such liability insurance?

## Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Under article V, section 1 (2) of the Colorado constitution, proposed initiatives amend either the Colorado constitution or state law (i.e., the Colorado Revised Statutes). The form of the proposed initiative suggests that you would like to

amend the Colorado Revised Statutes. Is this your intent? Please indicate through an amending clause (see next comment) where the proposed initiative language will be placed.

2. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, if you intend to add a new section 16-1-110 to title 16 of the C.R.S., you would include the following amending clause:

In Colorado Revised Statutes, **add** section 16-1-110 as follows:

3. Before the amending clause, number each section, part, etc., that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.). For example:

**SECTION 1.** In Colorado Revised Statutes, **add** section 16-1-110 as follows:

4. Constitutional/Statutory provisions are often divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs for ease of reading.

**X-X-XXXX. Headnote.** (1) Subsection.

- (a) Paragraph
- (I) Subparagraph
- (A) Sub-subparagraph
- (B) Sub-subparagraph
- (II) Subparagraph
- (b) Paragraph
- (2) Subsection
- (3) Subsection

Subsection (4) of the proposed initiative has paragraphs (a) to (d). The subsection might look like this:

(4) WITHOUT CONDITION OR STATE TAX LIABILITY, THE STATE SHALL PAY ALL DEFENDANTS FULLY EXONERATED OR FULLY DISMISSED AFTER 2017:

- (a) TWO THOUSAND DOLLARS PER FELONY FILED AND FIVE HUNDRED DOLLARS PER MISDEMEANOR FILED;
- (b) TWO HUNDRED DOLLARS PER DAY OF INCARCERATION AND FIFTY DOLLARS PER DAY OF PROBATION OR PAROLE WHEN NOT INCARCERATED;
- (c) ...;
- (d)...; AND
- (e)....



5. The term "and/or" is not used in statute (see subsection (4)(b) of the initiative). Please choose either "and" or "or," whichever is applicable.
6. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. Would the proponents consider a more specific, informative headnote?
7. It is standard drafting practice to use SMALL CAPITAL LETTERS to show language being added and ~~stricken-type~~ to show language being removed from the Colorado constitution or the Colorado Revised Statutes. Because the initiative is adding a new section, all of the language should be shown in small capital letters:

**16-1-110. Criminal justice.** (1) THE GOALS OF THIS "JUSTICE AND FAIRNESS ACT"...

8. If the proponents' intent was to make the short title of the section the "Justice and Fairness Act," common drafting practice for creating a short title for a section is as follows:

**16-1-110. Criminal justice.** (1) THE SHORT TITLE OF THIS SECTION IS THE "JUSTICE AND FAIRNESS ACT".

9. It is standard drafting practice when referencing statutory sections to include the word "section" before the number, i.e., "section 24-35-204.5." When referring to section 16-1-110 within section 16-1-110, please refer to it as "this section." For example, the last sentence of subsection (1) should read "VIOLATIONS OF THIS SECTION MAY VOID LATER ACTIONS."
10. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."
11. Please spell out numbers, percentages, and dollar amounts, i.e., "25%" should be "TWENTY-FIVE PERCENT."